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No. 82-827

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,
Petitioner,

vs.

MARSHALL DONALD MURPHY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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The Petitioner's Statement of the Case adequately describes the procedural history in the Minnesota courts. The facts are set forth in the opinion of the Minnesota Supreme Court, which is appended to the certiorari petition (App. A) and reported at 324 N.W.2d 340 (Minn. 1982).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE MINNESOTA SUPREME COURT APPLIED SETTLED PRINCIPLES OF FEDERAL CONSTITUTIONAL LAW TO ITS INTERPRETATION OF STATE LAW GOVERNING THE DUTIES OF THE PROBATION OFFICER AND TO ITS FACTUAL FINDING OF DECEPTION BY THE PROBATION OFFICER.

The Respondent had been ordered by a Minnesota court to report to his probation officer as directed and to truthfully answer her questions (App. C-31-33). The Minnesota Supreme Court interpreted the state court's probation order to mean that if the Respondent failed to appear at the probation office as directed, then the Respondent would be in violation of the court order and subject to arrest and detention (App. A-10).

In Minnesota, a probation officer is "an official representative of the [c]ourt" (App. C-33) whose authority is derived exclusively from the court's probation orders. The compulsory processes of the court are made available to probation officers solely for the purpose of keeping a sentencing court advised of an individual's progress while on probation (App. C-33-35). Minnesota law does not contemplate a probation officer using the court's compulsory processes to initiate or substantiate criminal investigations (App. C-31-35).

The Minnesota Supreme Court made two factual findings which control the outcome of this case. First, the probation officer intentionally used the compulsory processes of the court for the purpose of gathering evidence for the police (App. A-3). Second, the probation officer repeatedly told

the Respondent that she was questioning him about the murder only because she was concerned about the Respondent's need for treatment during the remainder of his probation (App. A-3). The Minnesota Supreme Court found that the probation officer made this representation even after the Respondent said that he felt like calling a lawyer (App. A-3-4). The Respondent had been deceived as to the true nature of the compulsory interview (App. A-4).

The controlling constitutional principles in this case were set forth in *Estelle v. Smith*, 451 U.S. 454 (1981); and *Garner v. United States*, 424 U.S. 648 (1976). In light of state law governing the role of a probation officer, the Minnesota Supreme Court correctly applied those settled constitutional principles to this unique fact situation.

II.

THERE IS NO CONFLICT BETWEEN THE MINNESOTA SUPREME COURT'S DECISION AND THE DECISIONS OF OTHER APPELLATE COURTS.

The appellate decisions cited by the Petitioner do not conflict with the decision in this case.

In *United States v. Miller*, 643 F.2d 713 (10th Cir. 1981); *United States v. Holmes*, 594 F.2d 1167 (8th Cir. 1979); and *State v. Roberts*, 544 P.2d 754 (Wash.App. 1976); the defendants' admissions to their probation officers were held to be admissible at trial. In those cases, the probation officers were not deliberately attempting to incriminate the defendants for the purpose of initiating or substantiating a criminal investigation. In the instant case, that was the probation officer's purpose. This factual distinction accounts for the different result in this case (App. A-10). *See also, In Re Richard T.*, 79 Cal.App.3d 382, 391, 144 Cal. Rptr. 856, 861 (1978).

In *Alspach v. State*, 440 N.E.2d 502 (Ind. App. 1982); and *People v. W.*, 24 N.Y.2d 732, 302 N.Y.S.2d 260, 249 N.E.2d 882 (1969); the defendants' admissions to their probation officers were held to be admissible at probation revocation proceedings. This case concerns the admissibility of evidence at a criminal trial. If this case had involved a probation revocation hearing, then the Minnesota Supreme Court may have reached the same result as the Indiana and New York courts (App. A-7-8). There is no conflict between these decisions.

The two other New York cases cited by the Petitioner are trial court decisions. *People v. Parker*, 100 Misc.2d 800, 421 N.Y.S.2d 561 (1979); *People v. Alston*, 79 Misc. 2d 586, 360 N.Y.S.2d 768 (1974). Those decisions appear to conflict with the decision in this case. However, a more recent New York appellate case suppressed a custodial confession made by a defendant to his parole officer even though the defendant had earlier been given *Miranda* warnings. *People v. Alston*, 431 N.Y.S.2d 82 (App.Div. 1980). In reaching its decision, the New York appellate court emphasized the defendant's legal obligation to answer his parole officer's questions and the deceptive nature of the interrogation. The decision by the Minnesota Supreme Court was based on these same factors.

Similarly, in *State v. Fields*, 621 P.2d 651 (Ore.App. 1980), *reconsidered*, 624 P.2d 655 (Ore.App. 1981); the probation officer used his authority in a deceptive way in order to obtain a confession for the police. Like the Minnesota Supreme Court, the Oregon appellate court suppressed the confession.

In summary, appellate courts have uniformly held that where probation officers use the courts' compulsory processes in a deceptive way to obtain confessions for the police, then such confessions will not be admitted at a criminal trial. There is no conflict which requires resolution by this Court.

III.

THE PROBATION OFFICER FAILED TO HONOR THE APPELLANT'S TIMELY ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THEREFORE THIS COURT IS NOT LIKELY TO REACH THE QUESTION PRESENTED.

When the probation officer confronted the Respondent with the information she had received about the murder, the Respondent immediately said that he felt like calling an attorney (App. C-16, 20, 21, 26). The probation officer then told the Respondent that he would have to deal with an attorney outside the probation office because her main concern was the Respondent's need for further treatment (App. C-9, 16, 17).

At the hearing on the Respondent's motion to suppress, the Respondent argued that the request for a lawyer constituted an assertion of the privilege which the probation officer was required to honor (App. B-6). The trial court did not discuss the issue (App. B-6-14).[1] The Minnesota Su-

[1]The trial court only mentioned the Respondent's request for an attorney during its discussion on voluntariness. The trial court said that he was "persuaded by the probation officer's testimony" that the Respondent's request for an attorney was made in the context of a "civil suit" for breach of confidentiality (App. B-13, 14). The trial court's reference to a civil suit was clearly erroneous (App. C-20, 21) and the Minnesota Supreme Court omitted the reference in its statement of the facts (App. A-3).

preme Court stated that it would not decide the issue (App. A-9).

A government official who has the power to compel answers to questions cannot arbitrarily deny an individual's request to consult with a lawyer. *Maness v. Meyers*, 419 U.S. 449 (1975). *See, United States v. Mandujano*, 425 U.S. 564, 581 (1976) (Burger, C.J., plurality). Where a government official attempts to use its compulsory processes to incriminate an individual, a timely request for a lawyer constitutes an assertion of the privilege against self-incrimination. *Fare v. Michael C.*, 442 U.S. 707 (1979). *See, Garner v. United States*, 424 U.S. 648 (1976). Any objection to a question which can reasonably be construed as an attempt to invoke the privilege must be honored. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (can request a lawyer "in any manner"); *Quinn v. United States*, 349 U.S. 155, 162-63 (1955) (can assert the privilege "in any language"); *Emspak v. United States*, 349 U.S. 190 (1955); *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978); *United States v. Goodwin*, 470 F.2d 893 (5th Cir.), *cert. denied*, 411 U.S. 969 (1972); *United States v. Prestigiacomo*, 504 F.Supp. 681 (E.D.N.Y. 1981); *Schwartz v. Secretary of Treasury*, 364 F.Supp. 344 (D.C.D.C. 1973).

In this case, the probation officer was an "official representative of the [c]ourt" (App. C-33) who had the power to compel answers from the Respondent (App. C-32, 34). The probation officer knew those answers would be incriminating in nature (App. A-3). *Compare, Garner v. United States*, 424 U.S. 648 (1976). Prior to answering any questions, the Respondent clearly stated that he felt like calling an attorney (App. A-3). He thereby invoked the privilege against self-incrimination. The Respondent's

assertion of the privilege was ignored by the probation officer and the subsequent confession is inadmissible at trial.

Based on the foregoing, the result reached by the Minnesota Supreme Court was correct regardless of whether the self-incrimination clause is self-executing under the facts of this case. The Respondent asserted the privilege and therefore this Court need not address the question presented.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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